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4 IN RE: EX PARTE APPLICATION OF  
5 PRO-SYS CONSULTANTS AND NEIL  
6 GODFREY.

7 Case No. [16-mc-80118-JSC](#)  
8

9 **ORDER GRANTING LEAVE TO  
10 SERVE SUBPOENA BY ALTERNATE  
11 MEANS**

12 Re: Dkt. No. 4

13 Applicants Pro-Sys Consultants and Neil Godfrey (together, “Pro”) previously filed an *ex*  
14 *parte* application pursuant to 28 U.S.C. § 1782 for permission to issue a subpoena to depose Jean-  
15 Louis Gassée (“Gassée”) in connection with an antitrust proceeding between Pro and Microsoft  
16 currently pending in the Supreme Court of British Columbia, Canada. (Dkt. No. 1.<sup>1</sup>) The Court  
17 granted Pro’s application on June 3, 2016. (Dkt. No. 3.) Despite numerous attempts, Pro has had  
18 difficulties personally serving Gassée with the subpoena and thus seeks leave from the Court to  
19 serve him by alternate means; namely, by delivering the subpoena via overnight courier to  
20 Gassée’s residence. (Dkt. No. 4.) After carefully considering the arguments and briefing  
21 submitted, the Court concludes that oral argument is unnecessary, *see* Civ. L.R. 7-1(b), and  
22 GRANTS Pro’s motion for leave the subpoena by alternate means.

23 **BACKGROUND**

24 The Court previously discussed the factual background of the case in its order granting  
25 Pro’s Section 1782 application and incorporates that discussion herein. (Dkt. No. 3 at 1-2.) Since  
26 the Court granted Pro’s application in June 2016, Pro has made various attempts through a process

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28 <sup>1</sup> Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the  
ECF-generated page numbers at the top of the documents.

1 server and through counsel to contact Gassée and serve him with a subpoena. From June 7, 2016  
2 through July 7, 2016, the process server attempted eight different times to serve Gassée at his  
3 residence in San Francisco, California. (Dkt. No. 4-1.) During two of those attempts, on June 13  
4 and 18, 2016, the process server in fact spoke to Gassée over the phone; each time Gassée  
5 indicated he was out of town and would return the following week, though Gassée never followed  
6 up with the process server. (*Id.*) Pro's counsel also spoke with Gassée on the phone on June 9,  
7 2016, letting Gassée know that Pro intended to serve him with a subpoena. (Dkt. No. 4-2 ¶ 4.)  
8 Gassée indicated that he was unwilling to accept service of the subpoena. (*Id.* ¶ 5.) Because of its  
9 inability to personally serve Gassée, Pro now moves the Court for leave to serve Gassée by  
10 delivering the subpoena via overnight courier to his residence. (Dkt. No. 4.)

## 11 DISCUSSION

12 Federal Rule of Civil Procedure 45(b)(1) provides, in relevant part, that “[s]erving a  
13 subpoena requires delivering a copy to the named person[.]” The Court previously addressed Rule  
14 45’s “delivering” requirement:

15 The majority of courts understand “delivering” to require personal  
16 service of the subpoena. *See Rijhwani v. Wells Fargo Home Mortg., Inc.*, No. C 13-05881 LB, 2015 WL 848554, at \*4 (N.D. Cal. Jan.  
17 28, 2015) (citation omitted); [*S.F. Bay Area Rapid Transit Dist. v. Spencer*, No. C 04-04632 SI, 2006 WL 2734284, at \*1 (N.D. Cal.  
18 Sept. 25, 2006)] (citations omitted); *Newell v. Cnty. of San Diego*, No. 12cv1696-GPC (BLM), 2013 WL 4774767, at \*2 (S.D. Cal.  
19 Sept. 5, 2013) (citations omitted); *see also Wright & Miller*, 9A Fed.  
20 Practice & Proc. § 2454 (3d ed. 2015) (“The longstanding  
21 interpretation of Rule 45 has been that personal service of the  
22 subpoena is required.”). Thus, “contrary to the practice with regard  
23 to the service of a summons and complaint, it is not sufficient to  
24 leave a copy of the subpoena at the dwelling place of the witness . . .  
25 [and] “unlike service of most litigation papers after the summons  
26 and complaint, service on a person’s lawyer will not suffice.”  
27 Wright & Miller, *supra*, § 2454 (collecting cases).

28 There appears to be a growing—although still minority—trend  
29 among courts to allow substitute service of a Rule 45 subpoena,  
30 such as mail delivery, so long as the method of service is reasonably  
31 calculated to provide timely, fair notice and an opportunity to object  
32 or file a motion to quash. *See id.; see, e.g., Toni Brattin & Co. v. Mosaic Int'l, LLC*, No. 15-mc-80090-MEJ, 2015 WL 1844056, at \*4  
33 (N.D. Cal. Apr. 9, 2015) (granting motion to serve Rule 45  
34 subpoenas by certified mail); *Green v. Baca*, No. CV 02-204744,  
35 2005 WL 283361, at \*1 n.1 (C.D. Cal. Jan. 31, 2005) (same  
36 (collecting cases)). To that end, “[c]ourts have permitted parties to

1 serve Rule 45 subpoenas by alternative methods of service[,]” in  
2 particular, service by mail. *Toni Brattin & Co.*, 2015 WL 1844056,  
3 at \*3 (citations omitted). Courts are more inclined to grant such  
4 alternative service where the serving party has provided sufficient  
5 evidence of its earlier diligence in attempting to effectuate personal  
service. *Id.* (collecting cases); *see, e.g., id.* (authorizing service by  
mail where the serving party made earlier attempts to make personal  
service, failed, and sought in advance leave of court to serve by  
alternative service).

6 *Fujikura Ltd. v. Finisar Corp.*, No. 15 MC 80110 HRL JSC, 2015 WL 5782351, at \*5 (N.D. Cal.  
7 Oct. 5, 2015).

8 Here, the Court is satisfied that Pro has been diligent in its efforts to effectuate personal  
9 service of the subpoena on Gassée. As noted above, a process server attempted service at  
10 Gassée’s residence on eight separate occasions, and Pro’s counsel also spoke with Gassée, who  
11 indicated that he would not accept service of the subpoena. Based on these efforts, it appears that  
12 Gassée is attempting to evade personal service. “Under these circumstances, the Court finds that  
13 Rule 45 should be construed as provided in Rule 1 ‘to secure the just, speedy, and inexpensive  
14 determination of every action,’ which would allow for alternate means of service.” *Toni Brattin*,  
15 2015 WL 1844056, at \*4 (citation omitted). Indeed, the Court “agrees that the Federal Rules of  
16 Civil Procedure should not be construed as a shield for a witness who is purposefully attempting  
17 to evade service.” *Id.* at \*3. Accordingly, Pro is permitted to serve Gassée by delivering the  
18 subpoena via overnight courier to his residence.

## 19 CONCLUSION

20 For the reasons stated above, the Court GRANTS Pro’s motion for leave to serve its  
21 subpoena on Gassée by alternate means. Pro shall serve a copy of this Order on Gassée along with  
22 the subpoena.

23 This Order disposes of Docket No. 4.

24 **IT IS SO ORDERED.**

25 Dated: October 14, 2016

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JACQUELINE SCOTT CORLEY  
United States Magistrate Judge